FILED
OCT 27 1980
MICHAEL RODAK, JR., CLERK

No. 80-441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OIL COMPANY, et al.,

Petitioners,

v.

WESLEY P. BERNARD, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Statement of the Case	1
Summary of Argument	
Argument: Reasons for Denying the Writ ..	3
I. The Petition for Certiorari Misstates Material Facts and Distorts the Record	3
II. In Holding that Plaintiffs' Employment Discrimination Action Was Timely, the Fifth Circuit Applied Settled Legal Principles in Accordance with the Decisions of Other Circuits and of this Court	10
III. In Holding that the District Court's Order Restricting Communications with Class Members Violated Rule 23 and the First Amendment, the Fifth Circuit's Decision is Consistent with the Decisions of the Other Circuits and with the Decisions of this Court	12
Conclusion	20

TABLE OF AUTHORITIES

Page

Cases

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 9

Boone v. Mechanical Specialties Co., 609 F.2d 956 (9th Cir. 1979) 9

CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975) 14

Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976) ... 14

Coles v. Marsh, 560 F.2d 186 (3rd Cir.), cert. denied sub nom Blue Cross v. Coles, 434 U.S. 985 (1977) 13,17

Conway v. California Adult Authority, 396 U.S. 107 (1969) 10

In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (7th Cir.), cert. denied sub nom General Motors Corp. v. Oswald, 444 U.S. 870 (1979) 17

In re Halkin, 598 F.2d 176 (D.C. Cir. 1979) 14

Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979) (en banc) 14

Page

Kamberos v. GTE Automatic Electric, Inc., 603 F.2d 598 (7th Cir. 1979) 9

Lewis v. Bloomsburg Mills, Inc., 608 F.2d 971 (4th Cir. 1979) 17

Lynn v. Western Gillette, Inc., 564 F.2d 1282 (9th Cir. 1977) 9

NAACP v. Button, 371 U.S. 415 (1963) 15,16

Near v. Minnesota, 283 U.S. 697 (1931) ... 13

Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) 13

New York Times Co. v. United States, 403 U.S. 713 (1971) 13

Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977) 9,10

In re Primus, 436 U.S. 412 (1978) 15,16

Rodgers v. United States Steel Corp., 508 F.2d 152 (3rd Cir.), cert. denied, 423 U.S. 832 (1975) 13,17

United States v. Sherman, 581 F.2d 1358 (9th Cir. 1978) 14

United States v. Tijerina, 412 F.2d 661 (10th Cir.), cert. denied, 396 U.S. 990 (1969) 16

Page

Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc., 455 F.2d 770 (2d Cir. 1972) ... 16

Constitutional Provisions, Statutes, and Rules

First Amendment, United States Constitution 2,12,13,15

42 U.S.C. § 1981 1,2

42 U.S.C. § 2000e et seq., Title VII of the Civil Rights Act of 1964, as amended 1,2,11

Rule 23, Fed. R. Civ. P. 2,12,13

Other Authorities

Manual for Complex Litigation (1977 ed.), 1 Pt. 2 Moore's Federal Practice (2d ed. 1980); Wright & Miller, Manual for Complex Litigation (1977) 3,17-19

Manual for Complex Litigation, Tentative Draft of the Fifth Revision, with Amendments to Feb. 4, 1980 (issued June 24, 1980) 18,19

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BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This case presents questions concerning (1) the timeliness of a class action challenging racial discrimination in employment under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, and (2) the validity of orders restric-

ting communications by the named plaintiffs and their counsel with actual and potential class members. The Fifth Circuit, sitting en banc, adopted the panel opinion insofar as it held that plaintiffs' individual and class Title VII claims were timely filed, that their § 1981 claims were not barred by the statute of limitations, and that none of their claims was barred by the doctrine of laches. The en banc court further held that an order restraining communications in this case violated the First Amendment to the Constitution and Rule 23, Fed. R. Civ. P.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied for three reasons. (1) Petitioners have seriously misstated the facts and have distorted the record in a manner which obscures the issues in this case. (2) In holding that plaintiffs' action satisfied the statutory time limits of Title VII and was not barred by laches, the Fifth Circuit correctly applied settled legal principles in accordance with the decisions of the other circuits and of this Court. (3) In holding that

the plaintiffs and their counsel in this civil rights case could not properly be restrained from communicating with class members, the Fifth Circuit rejected the recommendations of prior editions of the Manual for Complex Litigation but followed the applicable decisions of the other circuits and of this Court. The Manual is now being revised in a manner which may bring it into conformity with these decisions.

ARGUMENT

Reasons for Denying the Writ

I. THE PETITION FOR CERTIORARI MISSTATES MATERIAL FACTS AND DISTORTS THE RECORD.

The opinions of the Fifth Circuit contain a full and accurate statement of the facts. See 596 F.2d at 1253-54 (Pet. App. C at 1-4)[1/] (panel majority opinion); 596 F.2d at 1263-67 (Pet. App. C at 24-32) (Godbold, J., dissenting); 619 F.2d at 463-66 (Pet. App. at 2-9) (en banc majority opinion). However, in petitioning this Court to

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1/ Citations in this form refer to the appendix to the petition.

review the en banc decision of the court below, Gulf Oil Company and the Oil, Chemical and Atomic Workers' Union have seriously misstated material facts and have distorted the record in a manner which obscures the issues in this case.[2/]

On the question of timeliness, for instance, petitioners incorrectly assert that the February 1975 letter from the Equal Employment Opportunity Commission to plaintiffs Bernard, Brown, and Johnson, "in essence, stated no further action was contemplated by the Commission" (Pet. at 6). In fact, this letter notified plaintiffs that Gulf did not wish to entertain conciliation discussions; it advised plaintiffs that they could request a "Notice of Right to Sue" at any time; and it stated that "you will have ninety (90) days from the date of its receipt [i.e., receipt of the Notice of Right to Sue] to file suit in Federal

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2/ Petitioners made the same false and misleading statements in their briefs to the Fifth Circuit. See Reply Brief for Appellants, at 3-8; Reply Brief for Appellants on Rehearing En Banc, at 2-10. That court rejected petitioners' version of the facts.

District Court."[3/] For more than a year following its issuance of this letter, the EEOC actively reviewed its files on Gulf in anticipation of possible litigation; it did not decide against bringing suit until March 1976 (see Brief for the EEOC as Amicus Curiae on Rehearing En Banc, at 3). Moreover, on the basis of a separate charge of discrimination which had been filed against Gulf by an EEOC commissioner in 1967, Gulf engaged in continuing conciliation discussions which culminated in its April 1976 conciliation agreement with the EEOC and the Department of the Interior (id. at 4).[4/]

3/ The full text of the letter is reprinted in the appendix to the petition (Pet. App. I at 3-4, 8-9, 13-14).

4/ Petitioners also erroneously state that plaintiffs Bernard and Brown received their right-to-sue notices on April 11, 1976 (Pet. at 6). The record shows that plaintiffs requested these notices and filed suit only after they had awaited the outcome of the EEOC administrative process and had determined that the relief provided by the conciliation agreement of April 14, 1976, was inadequate. Accordingly, the notices were not issued until June 11, 1976 (Pet. App. J). Plaintiffs subsequently amended their complaint, which had been filed in May 1976, to reflect their receipt of the right-to-sue notices.

Petitioners have also misrepresented and distorted the facts concerning the district court's orders restraining communications with class members. These orders were entered after attorneys for Gulf had made unsworn allegations, based on a report by an unidentified informant, that one of plaintiffs' counsel had made improper or unethical statements at a meeting with class members. See 619 F.2d at 463-64 (Pet. App. A at 3-4). As it did on the appeal to the Fifth Circuit, however, Gulf in its petition to this Court (Pet. at 7) "restates the hearsay as though it were fact proved and found." 596 F.2d at 1267 n.9 (Pet. App. C at 34 n.9) (Godbold, J., dissenting from the decision of the panel majority). Gulf never offered any evidence to support its allegations. As Judge Godbold noted below, "Counsel for Gulf treat more lightly charging an attorney with unethical and improper conduct that I would be willing to do." Id. at 1268 n.9 (Pet. App. C at 34 n.9).

Petitioners erroneously state that the first order restraining communications (the order of May 28, 1976) was entered "without formal

objection by Respondents" (Pet. at 7). In fact, Gulf's initial motion to limit communications with the class members was filed on May 27 (A. 14)[5/] and was granted ex parte the following day (A. 30-31). After plaintiffs received notice of the order, they filed a memorandum of law opposing Gulf's motion (A. 1, Dkt. Entry No. 40), and thereafter plaintiffs repeatedly opposed the gag orders in the district court (id., Nos. 40, 99, 129, 135).

Petitioners claim that the second order restraining communications (the order of June 22, 1976) was entered "after extensive briefing accompanied by affidavits and a hearing" (Pet. at 8; see also id. at 11). In fact, the only affidavits concerning this issue were submitted by plaintiffs' counsel, not by defendants; these affidavits demonstrated that no unethical or improper conduct had occurred or was likely to occur (A. 46-55). Moreover, the district court never held an evidentiary hearing on this question, but merely heard the oral arguments of

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5/ Citations in this form refer to the joint appendix filed in the Fifth Circuit.

counsel. Gulf never produced one shred of evidence, in an affidavit or in any other form, to substantiate its attorneys' allegations.

Petitioners incorrectly describe the order of June 22 as "permit[ting] constitutionally protected communications while limiting only those communications that had the purpose of solicitation and that tended to misrepresent the status, purposes and effects of the cause of action and that impeded the orderly administration of justice" (Pet. at 8). In fact, the order -- which is reprinted in full in the appendix to the petition (Pet. App. E) -- prohibits all communications concerning the case with any actual or potential class members unless the court has specifically approved both the proposed communication and the proposed addressees (Pet. App. E at 1-2). It excepts from its prohibitions (1) certain communications initiated by a client or prospective client and (2) certain communications occurring in the regular course of business (id. at 2-3). It requires that any constitutionally protected communication be filed with the court within five days after its occurrence (id. at 3). Finally, the order expressly states that the communications

which are forbidden are not limited to those involving solicitation or misrepresentation (id. at 2, ¶ 2), and it provides that all communications not specifically authorized in the order are strictly forbidden (id. at 4, ¶ 8).

Petitioners also assert that plaintiffs' July 6, 1976, motion to communicate with members of the proposed class "was denied as Respondents' communication[6/] tended to misrepresent the status, purposes and effects of the cause of action" (Pet. at 8) (footnote added). However, the district court made no such finding; instead, the court issued a one-sentence order denying the motion without any explanation or statement of reasons.[7/]

Thus, the petition misstates and distorts facts which are crucial to a proper determination of the issues in this case. Petitioners' failure to provide this Court with an accurate statement of the facts warrants the denial of their petition.

6/ The notice which plaintiffs proposed to distribute to the class members is reprinted in 596 F.2d at 1266 (Pet. App. C at 30-31).

7/ This order is reprinted in the appendix to the petition (Pet. App. L).

See Conway v. California Adult Authority, 396 U.S. 107 (1969).

II. IN HOLDING THAT PLAINTIFFS' EMPLOYMENT DISCRIMINATION ACTION WAS TIMELY, THE FIFTH CIRCUIT APPLIED SETTLED LEGAL PRINCIPLES IN ACCORDANCE WITH THE DECISIONS OF OTHER CIRCUITS AND OF THIS COURT.

The Fifth Circuit found that the plaintiffs in this case reasonably awaited the completion of the EEOC administrative process before filing suit, and that any prejudice suffered by Gulf was caused not by plaintiffs' delay but by Gulf's own negligence and its destruction of personnel records in violation of EEOC regulations. The court therefore held that the plaintiffs' action was not barred by laches. This decision is consonant with all of the assertedly conflicting decisions cited by petitioners. See Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 373 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 424 (1975); Kamberos v. GTE Automatic Electric, Inc., 603 F.2d 598, 603 (7th Cir. 1979); Boone v. Mechanical Specialties Co., 609 F.2d 956, 959-60 (9th Cir. 1979); Lynn v. Western Gillette, Inc., 564 F.2d 1282, 1287-88

(9th Cir. 1977).[8/]

The Fifth Circuit also held that the plaintiffs were not required to sue under Title VII within ninety days after receiving an EEOC letter advising them simply of the failure of conciliation, but were entitled to await receipt of clear notice that the administrative process had been completed. As petitioners have conceded, this decision is consistent with the decisions of all the other circuits,[9/] and it correctly interprets Title VII.[10/] Accordingly, there is no reason for this Court to review the question.

8/ In each of the cited cases, the court stated or held "that when a Title VII defendant is in fact prejudiced by a private plaintiff's unexcused conduct of a particular case, the trial court may restrict or even deny backpay relief." Occidental Life Ins. Co. v. EEOC, supra, 432 U.S. at 373. The record here shows neither unexcused conduct by plaintiffs nor resulting prejudice to defendants.

9/ See the cases cited in the petition at 19, n.9.

10/ "At the time this suit was filed, a charging party was required to file a cause of action in federal court within 90 days of notice that the EEOC's administrative process had been completed. See 42 U.S.C. § 2000e-5(f)(1) (1976)." (Pet. at 19).

III. IN HOLDING THAT THE DISTRICT COURT'S ORDER RESTRICTING COMMUNICATIONS WITH CLASS MEMBERS VIOLATED RULE 23 AND THE FIRST AMENDMENT, THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH THE DECISIONS OF THE OTHER CIRCUITS AND WITH THE DECISIONS OF THIS COURT.

Petitioners presented no evidence to the district court, and the district court made no findings, that plaintiffs or their counsel either had engaged or were ever likely to engage in any improper or unethical conduct, or that their communications with class members posed any threat whatever to the administration of justice. Thus, the question framed by petitioners -- whether the district court could restrain speech "in order to prevent actual and potential abuses of the class action device" (Pet. at II) -- is not presented by this case. The real question presented here is whether, in the absence of any proof of an actual or even a potential abuse, plaintiffs and their counsel could properly be restrained from communicating with class members. The Fifth Circuit en banc, by a vote of 21 to one, correctly held that such restraints are impermissible.

Only one other circuit, the Third, has ruled on the validity of similar restrictions on communications by plaintiffs and their counsel with class members. That circuit has twice held that such restrictions are contrary to the purpose of Rule 23 and therefore are beyond the powers of the district courts. Rodgers v. United States Steel Corp., 508 F.2d 152 (3rd Cir.), cert. denied, 423 U.S. 832 (1975); Coles v. Marsh, 560 F.2d 186 (3rd Cir.), cert. denied sub nom Blue Cross v. Coles, 434 U.S. 985 (1977). The Fifth Circuit's en banc decision in the case at bar is fully consistent with Rodgers and Coles.

The Fifth Circuit's decision also is consistent with the many decisions of this Court holding that, in all but the most extreme circumstances, prior restraints on speech violate the First Amendment. See, e.g., Nebraska Press Association v. Stuart, 427 U.S. 539 (1976); New York Times Co. v. United States, 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697 (1931). As other circuits have recognized, the constitutional principles underlying these decisions apply to speech by lawyers and litigants about pending litigation: such speech can be restrained only if (1) it poses a

clear and imminent danger to the fair administration of justice, (2) the restraining order is narrowly drawn and precise, and (3) there is no less restrictive means of preventing the demonstrated harm. In re Halkin, 598 F.2d 176 (D.C. Cir. 1979); United States v. Sherman, 581 F.2d 1358 (9th Cir. 1978); Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976); CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975).[11/] Here, there was no evidence of any danger whatsoever to the fair administration of justice, the restraining order was broad and all-encompassing, and no consideration was given to less restrictive alternatives. The Fifth Circuit thus correctly applied the constitutional principles established by this Court and adopted by other circuits in concluding that

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11/ Two circuits have adopted an ostensibly less rigorous standard, under which speech about pending litigation may be suppressed if it presents a reasonable likelihood of prejudice to the fair administration of justice. Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979) (en banc); United States v. Tijerina, 412 F.2d 661 (10th Cir.), cert. denied, 396 U.S. 990 (1969). The difference between these two standards has no practical significance in this case, for the record here contains no evidence of any danger to the fair administration of justice.

the order restraining communications violated the First Amendment.

Finally, the Fifth Circuit's decision is consistent with this Court's decisions in NAACP v. Button, 371 U.S. 415 (1963), and In re Primus, 436 U.S. 412 (1978). The plaintiffs in the instant case are represented by attorneys associated with the NAACP Legal Defense and Educational Fund, Inc. In Button the Court held that, in promoting and conducting litigation to remedy racial discrimination, NAACP and Legal Defense Fund lawyers engage in constitutionally protected forms of expression and association. 371 U.S. at 422, 433-36. In Primus, the Court again recognized the Legal Defense Fund by name in holding that the First Amendment protects the speech and conduct of such attorneys in advising people of their civil rights and engaging in litigation to vindicate those rights. 436 U.S. at 429. These freedoms may not be limited except upon a showing that there is "'a subordinating interest which is compelling' ... and that the means employed in furtherance of that interest are 'closely drawn to avoid unnecessary abridgment of associational freedoms.'" Id. at 432 (citations omitted). Since the constitu-

tionally required showing was never made in this case, the Fifth Circuit's decision is consistent with Button and Primus.

Contrary to petitioners' contention, the decision below does not conflict with the decision in Weight Watchers of Philadelphia, Inc. v. Weight Watchers International Inc., 455 F.2d 770 (2d Cir. 1972). In Weight Watchers the Second Circuit held that, where an order permits a defendant to communicate with corporate class members in franchise litigation while adequately safeguarding the rights of those class members,[12/] it is not an appealable order, id. at 772-75, and it is not subject to review on a petition for mandamus, id. at 775. The Seventh Circuit has also noted that, in appropriate circumstances, a district court may permit the communication of a settlement offer by a defendant to members of a plaintiff's

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12/ The order provided that counsel for the class members were to be present at each negotiating session and were to review any new contract provisions; that plaintiff's counsel were to receive advance notice of any negotiations and be afforded a full opportunity to express their views concerning the action; and that the last negotiating session with each class member prior to execution of a contract was to be held at a location convenient to plaintiff's counsel. 455 F.2d at 772.

class. In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1137-41 (7th Cir.), cert. denied sub nom General Motors Corp. v. Oswald, 444 U.S. 870 (1979). But no decision of any circuit conflicts with the Third Circuit's decisions in Rodgers and Coles, or with the Fifth Circuit's decision in the case at bar, that local rules and orders are invalid when they restrain communications by plaintiffs and their counsel with class members in civil rights cases.[13/]

Although there is no conflict in the circuits on this issue, petitioners have correctly noted that the en banc decsion of the Fifth Circuit not only conflicts with but expressly rejects the recommendations of § 1.41 of the 1973 and 1977 editions of the Manual for Complex Litigation.[14/]

13/ This question was presented but not decided in Lewis v. Bloomsburg Mills, Inc., 608 F.2d 971 (4th Cir. 1979). There the court held that an order restraining communications by plaintiffs and their counsel with class members in an employment discrimination case was not an appealable order and was not subject to review by mandamus.

14/ The 1977 edition of the Manual appears in 1 Pt. 2 Moore's Federal Practice (2d ed. 1980) and in Wright & Miller, Manual for Complex Litigation (1977).

However, the Manual is currently undergoing revision. In a recently issued tentative draft,[15] the Manual's board of editors has made substantial changes in § 1.41. For instance, all recommendations that communications with actual or potential class members be restricted by local rule have been deleted from § 1.41 (tentative draft, pp. 67-76), and Suggested Local Rule No. 7 has been removed from the Manual's appendix (id. at 504-10). While the tentative draft continues to recommend that district courts enter orders restraining communications without requiring any showing of an actual or threatened abuse (id. at 70-71, 75-76),[16] this recommendation was made without the benefit of the Fifth Circuit's en banc

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15/ Manual for Complex Litigation, Tentative Draft of the Fifth Revision, with Amendments to Feb. 4, 1980 (issued by the Federal Judicial Center, June 24, 1980).

16/ But cf. id. at 69 (orders restraining communications should be entered "when necessary or desirable").

decision in the case at bar.[17/]

The final draft of the Manual, which has not yet been issued, may well make still more changes in the recommendations concerning communications in class actions. The Court should not grant the petition in this case on the basis of an asserted conflict that may no longer exist when the revision of the Manual has been completed.

17/ In support of this recommendation, the tentative draft cites the decision of the panel majority which was overturned by the en banc court. See id. at 76, 332 n.42c.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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